Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1264

THOMAS EARL HENDERSON JR. et al,
Petitioner,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 8, 1979

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FORT WORTH INDEPENDENT SCHOOL DISTRICT et al, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Thomas Earl Henderson et al, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 17, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals en banc reported at 548 F.2d 115 (5th Cir.

1978), and referred to herein as Henderson III, appears as Appendix A.

The District Court opinion on the issue of attorney's fees has not been reported and appears here as Appendix B.

The panel decision of the Court of Appeals on attorney's fees referred to herein as Henderson II is reported at 574 F.2d 1210 (5th Cir. 1978).

The panel decision of the Court of Appeals on the merits referred to herein as Henderson I is reported at 526 F.2d 286 (5th Cir. 1976).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit on the issue of attorney's fees was entered on June 12, 1978. A timely petition for rehearing en banc was granted on August 14, 1978 and the judgment of the Court of Appeals en banc was entered on November 17, 1978. This petition for certiorari was filed within

ninety (90) days of that date. This Court's jurisdiction is invoked under 29 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

Whether the District Court holding denying an attorney's fee award under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C.§1988) to the prevailing Plaintiffs who successfully challenged a state statutory requirement that School Board officeholders be freeholders in the district for one year and qualified voter in the district for three years on the grounds that;

a) "honest pursuit and defense of their statutory duty" would render such an award "not only inappropriate but unjust"; (Appendix B p. 29)

b) the "judgment rendered for Plaintiff is not of sufficient social significance to justify and award of attorney's fees" under the Act; (Appendix B p. 27)

c) the "Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter"; (Appendix B p. 29) and

d) since the issue of an award of an attorney's fee was decided after the Court of Appeals had reversed the District Court the suit was only "technically pending" on the date the Act became effective (Appendix B p. 24) is erroneous and an abuse of discretion since

1) the reasons given are not sufficient to overcome the presumption set out in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1963) that "the successful Plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust";

2) the District Court's discretion in awarding an attorney's fee to a prevailing Plaintiff under 42 U.S.C.§1988 is limited to a determination of the amount of the fee;

3) there are no "special circumstances" sufficient to deny the award of an attorney's fee under 42 U.S.C.§1988 where the Plaintiff prevails in vindicating constitutional rights.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:§1988

In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes (42 U.S.C.§1981-1983, 1985, 1986) Title IX of Public Law 92-318, (20 U.S.C.§1681 et. seq.) or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, (42 U.S.C.§2000d et. seq.), the Court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

This action was originally brought when the Appellants, Thomas Earl Henderson Jr. together with Carlos Puente (now a member of the Board of Education of the Fort Worth Independent School District) sought election to the School Board of the Fort Worth Independent School District in April of 1974. Both were denied positions on the ballot for that election by a vote of the School Board of the Fort Worth Independent School District on grounds that neither met the requirement set out by law for holding said office. This action followed for injunctive and declaratory relief seeking to have declared as unconstitutional the statutory requirement that a candidate for the School Board of the Fort Worth Independent School District be a qualified voter in that district for a period of three years and a freeholder within the district for a period of one year. The

petitioner sought relief on the theory that the candidacy requirement violated the Equal Protection Clause of the Fourteenth Amendment and unduly burdened the right of interstate travel. The District Court struck down the freeholder requirement but upheld the qualified voter restriction. Petitioners appealed. On January 22, 1976 the Court of Appeals in an opinion by Judge Thornberry, held that the three year "qualified voter" requirement went beyond the necessary power of the state to prescribe minimal candidate qualifications and denied petitioner Henderson rights secured by the Equal Protection Clause of the Fourteenth Amendment. (Henderson I, 526 F.2d 286, 293) The cause was reversed and remanded to the District Court. Petitioner Henderson ran for office in the School Board Election of 1976 but was not elected. Petitioner Puente did succeed in his election in 1978. On June 30, 1977 a hearing was conducted on

Petitioner's motion for an attorney's fee said issue having been severed out of the initial cause of action by the Pretrial Order to be heard at a later time should the Plaintiffs prevail in their constitutional claims. Following an evidentiary hearing the District Court denied Petitioner-Plaintiffs an attorney's fee stating as reasons that:

a) "honest pursuit and defense of their statutory duty" would render such an award "not only inappropriate but unjust"; (Appendix B p. 29)

b) the "judgment rendered for Plaintiff is not of sufficient social significance to justify and award of attorney's fees" under the Act; (Appendix B p. 27)

c) the "Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter"; (Appendix B p. 29) and

d) since the issue of an award of an attorney's fee was decided after the Court

of Appeals had reversed the District Court the suit was only "technically pending" on the date the Act became effective. Appendix B p. 24)

The Court of Appeals affirmed the District Court judgment on June 12, 1978 holding that the Civil Rights Attorney's Fees Awards Act was primarily designed to remedy discrimination based on race, sex, religion, wealth, or other such class categories which did not apply in the opinion of the panel to the case at bar. Henderson II, 574 F.2d 1210 (5th Cir. 1978). The Court of Appeals granted the Petitioner's motion for rehearing en banc, vacated the panel opinion, reached an even division on the issues and thus affirmed the District Court opinion by operation of law. (Henderson III, Appendix A) The effect of the even division of the en banc Court was to render the panel decision of the Court of Appeals of no precedential value. (Hender-

son III, Appendix A)

REASONS FOR GRANTING THE WRIT

1. The question of what special circumstances would be sufficient to overcome the presumption of entitlement to a reasonable attorney's fee to a prevailing Plaintiff in the ordinary case has not heretofor been settled by the Court.

This Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) held that in interpreting language of Title II of the Civil Rights Act of 1964 [42 U.S.C. §2000a-3(a)] identical to that used in the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.§1988) that the Plaintiff "should ordinarily receive an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402. This Court's Per Curiam opinion was based on the Congressional intent in passing the 1964 Civil Rights Act

> not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. 390 U.S. at 402.

This Court did not expand on the definitions of special circumstances except to note in Footnote 5 of the Court's opinion that the matter before the Court was not even a borderline case due to the frivolous defenses interposed by the Respondents.

There seems to be little doubt that Congress intended that the Newman standard be applied to the Civil Rights Attorney's Fees Awards Act of 1976. Both House and Senate reports on the act evidence Congressional intent to apply the Newman standard:

> it is intended that the standards for awarding fees be generally the same as under the Fee Provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) Senate Report No. 94-1011 p. 5.

This Court has shown a willingness to adopt the Senate and House Reports as evidencing the legislative history of the Act. In the only decision to date to come before this Court concerning the Act, Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978) this Court quoting from the Senate and House Reports found that attorney's fees could be collected either directly from the official in his official capacity or from funds of the agency under his control or from the state or local government as stated in the legislative report. Hutto, supra. In Hutto this Court laid to rest the question which troubled the District Court as to the applicability of the 1976 Amendment to 42 U.S.C.§1988 to cases such as this one where the merits had already been decided when the Act was passed. (The District Court found that the case was "technically... applicable.") In Footnote 25, the Court states:

> The Attorney General also contends that the fee award should not apply to cases, such as this one, that were pending when the Act was passed in 1976. But the legislative history of the Act as well as this Court's general practice, defeat this argument. The House Report declared: "In accordance with applicable decisions of the Supreme Court, the Bill is intended to apply to all cases pending on the date of enactment..." H.R. Rep. No. 94-1558, p. 4 n. 6 (1976). See also Bradley v. School Board, 416 U.S. 696. Hutto v. Finney, supra.

The House Report on the Act cites in addition to the above quoted phrase from Newman an additional purpose in passing the Act:

> The rationale of the rule rests upon the recognition that nearly all Plaintiffs in these suits are disadvantaged persons who are victims of unlawful or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the Federal Courts. "If successful Plaintiffs were routinely forced to bear their own attorney's fees, few agrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal Courts." Newman v. Piggie Park Enterprises, Inc., supra at 402. House Report 94-1558, p. 6.

The Civil Rights Attorney's Fees

Awards Act of 1976 was passed by Congress in response to this Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). See Senate Report No. 94-1011, p. 1, House Report No. 94-1558, pgs. 1 and 2. In Alyeska this Court speaking through Justice White underlined the importance of a statutory scheme such as the one Congress ultimately passed:

> And, if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a Court deny attorneys' fees to private litigants in actions under 42 U.S.C.§1983 seeking to vindicate constitutional rights? Moreover, should Courts, if they were to embark on the course urged by the Respondents opt for awards to the prevailing party, whether Plaintiff or Defendant, or only to the prevailing party in question? Should awards be discretionary or mandatory? Would there be a presumption operating for or against them in the ordinary case? See Newman, supra. Alyeska Pipeline Service Co. v. Wilderness Society. 421 U.S. at 264.

The Court's speculation on the presumption of a fee award operating for or against a prevailing Plaintiff or Defendant

in the ordinary case was resoundingly answered by the Congressional enactment in the exact words of the statute interpreted by the Court in Newman.

Does the District Court's rationale for denial overcome the Newman presumption?

Henderson is at least the ordinary case, if indeed any litigation concerning constitutional rights can be considered "ordinary". It may be more.

The Petitioner succeeded in striking down a freeholder requirement that had been a part of the requirement for election to the Board of Trustees of the Fort Worth Independent School District for over four years after this Court had ruled in Turner v. Fouch, 396 U.S. 346 (1970) that such requirements were unconstitutional. In addition the Plaintiff prevailed before the Court of Appeals on the question of the durational voter registration requirement imposed upon candidates seeking election

to the Fort Worth School Board. The Fifth Circuit Panel speaking through Judge Thornberry struck down the three year voter registration requirement in the district as being in violation of the Equal Protection Clause of the Fourteenth Amendment. In doing so the Court dealt with the sticky question of which standard of review should govern the review of such a requirement and found that the requirement was subject to the strict scrutiny required where fundamental rights are at stake under the Equal Protection Clause. Henderson v. Fort Worth Independent School District, 526 F.2d 286, 292 (5th Cir. 1976). The Court of Appeals speaking through Judge Thornberry found that the District Court had applied the wrong standard of review and in reviewing the matter under the strict scrutiny standard required by the case found the statute to be unconstitutional. 526 F.2d at 293. Thus, the Plaintiff

succeeded in vindicating rights not only for himself but for others. In the School Board Election of 1976 which followed by two months the Fifth Circuit opinion 25% of the candidates for the Fort Worth Independent School Board (4 out of 17 candidates) could not have sought election had the three year voting registration requirement not been found unconstitutional.

The Court of Appeals considered the case of such significance that oral argument was scheduled in Atlanta, Georgia, some distance from the home of the Plaintiff. A well reasoned and scholarly opinion on constitutional issues of far reaching effect was rendered.

Do any circumstances arise to overcome the Newman presumption? The District Court finding that the case lacked "social significance" was apparently not shared by the Court of Appeals. Nor did the District Court state any facts to support its

conclusion. There is nothing to overcome the Newman presumption and much to support it.

The District Court rationale that Defendants lacked "bad faith" and "undue obstinacy" although mentioned frequently in the District Court's opinion were rejected over by the District Court and are unquestionably rejected in the legislative history and by Alyeska. The sole remaining reason for overriding the Newman presumption is the District Court's contention that "honest pursuit and defense of this statutory duty" would render such an award "not only inappropriate but unjust." (Appendix B p.29). To allow this rationale the status of a special circumstance such as to overcome the Newman presumption would destroy the Act. The Act was passed to provide for awards where Defendants pursue their duties in good faith. Alyeska never overruled awards where the defense was made

in bad faith. The rationale destroys the importance placed on private enforcement of the civil rights and constitutional rights by this Court in Newman and Alyeska. To allow such circumstance to defeat an award would mean every unconstitutional piece of state legislation no matter how oppressive it may be to the Constitution would defeat the shift of the economic burden of enforcement of Constitutional rights from the oppressor to the oppressed.

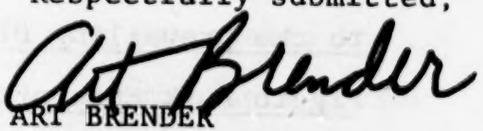
2. This Court should in the exercise of its supervisory power over the lower Federal Courts decide this issue which evenly divided the Court of Appeals on the question of whether or not any special circumstances were present such as to overcome the presumption of an attorney's fee to the prevailing Plaintiff in Newman v. Piggie Park Enterprises, Inc., 290 U.S. 400 (1968). Since the Fifth Circuit Court of Appeals evenly divided on the issue

this Court should, in an area that has become an increasing problem and a source of increasing litigation and appeals, decide the question of under what circumstances if any the District Court may deny an attorney's fee. This Court should provide lower Federal Courts guidance as to the presumption of a fee in the ordinary case and under what if any set of circumstances the District Court can deny a fee even though the Plaintiff prevails particularly where Constitutional as opposed to statutory rights are at stake.

RELIEF SOUGHT

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,



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February 8, 1979

Appendix A

Thomas Earl HENDERSON, Jr., et al.,
Plaintiffs-Appellants,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al., Defendants-Appellants.

No. 77-2839.

United States Court of Appeals,
Fifth Circuit.

Nov. 17, 1978

Appeal from the United States District Court for the Northern District of Texas; Eldon B. Mahon, Judge.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

PER CURIAN:

In this case, a panel of the Court affirmed the district court by a written opinion. Henderson v. Fort Worth Independent School District, 574 F.2d 1210 (5th Cir. 1978). A petition for rehearing

en banc was granted, which effectively vacates the panel opinion as a citable precedent. With the panel opinion vacated the en banc court has reached an even division as to the issues raised on appeal. Thus, the district court is affirmed by operation of law, and the decision of the court of appeals has no precedential value.

AFFIRMED BY OPERATION OF LAW.

Appendix B

EARL HENDERSON

VS.

FORT WORTH INDEPENDENT SCHOOL DISTRICT

CIVIL ACTION NO. CA 4-74-58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

There is now pending before the Court Plaintiff's Motion for Attorney's Fees. This motion came on for hearing before the Court on 30 June 1977. After careful consideration, the Court in its discretion in this matter is of the opinion that the motion should be denied.

Plaintiff in this motion relies solely on Public Law 94-559, The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. A. §§ 1988. The pertinent passage is the following:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this

> title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis supplied).

Plaintiff's Trial Brief in support of the motion for an award of reasonable attorney's fee contends that the Civil Rights Attorney's Fees Awards Act of 1976 applied retroactively to lawsuits pending in federal courts on the date of enactment October 19, 1976, and Plaintiff cites legislative history and cases in support thereof.

This Court agrees that technically 42 U.S.C. 1988 is applicable.

This suit was technically pending on the date of the attorney's fees amendment to 42 U.S.C. 1988. This Court entered a memorandum opinion on March 5, 1974, denying temporary relief. In a Pre-Trial Order

filed January 30, 1975, the question of attorney's fees was severed out from the cause. On May 13, 1975, this Court entered a take nothing judgment against the Plaintiff.

On January 22, 1976, the United States Court of Appeals for the Fifth Circuit, at 526 F.2d 286 (5th Cir. 1976), reversed and remanded the prior judgment of this Court, and instructed this Court to enter a new judgment.

Approximately nine months later, on October 19, 1976, the attorney's fees amendment to 42 U.S.C. 1988 was enacted.

Due to the heavy case load and docket schedule, the formality of entering an Order withdrawing the Judgment of May 13, 1975, and entering a new Judgment, holding Section 7 of Chapter 230, Local and Special Laws, Acts of the 39th Legislature of the State of Texas, 1925, to be unconstitutional was not officially entered until February

14, 1977, though the merits had in actuality been resolved by the appellate judgment of January 22, 1976, and the decision of Defendants not to pursue an appeal.

In a technical sense as to the procedural entry of judgment by this Court, the suit was pending on October 19, 1976. In addition it should be noted that the question of attorney's fees had been severed in the Pre-Trial Order and was also pending. It is appropriate to apply the attorney's fees provision of 42 U.S.C. 1988 to this action.

It should be noted that this suit was never certified as a class action.

Under the provision of 42 U.S.C. 1988, the award of attorney's fees is by no means mandatory, but by the precise wording of the provision discretionary with the Court. In the discretionary judgment of this Court it would be inappropriate to award attorney's fees under the facts presented

in this case, especially in view of the fact that the final judgment should have been entered earlier by this Court, prior to the enactment of the attorney's fees amendment to 42 U.S.C. 1988. In addition, under the unique fact situation in this case, it is the discretionary opinion of this Court that the judgment rendered for Plaintiff is not of sufficient social significance to justify an award of attorney's fees under 42 U.S.C. 1988.

Plaintiff in his Trial Brief and by oral admission of his attorney at the hearing on this question admitted that Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter. Had any element or aspect of bad faith been present, this Court would not hesitate in awarding appropriate attorney's fees to Plaintiff. Since this Court initially found for the Defendant obviously there was no bad faith present. This

Court comments on the lack of bad faith simply for purposes of clarity and perspective, and in full awareness that there is no bad faith standard necessary under 42 U.S.C. 1988, and that under the statute an award of attorney's fees may be made even when there is a complete absence of bad faith.

Plaintiff had sought to have an Act of the Legislature of the State of Texas, enacted in 1925 and never before challenged, declared unconstitutional. The School Board of the Fort Worth Independent School District was under a duty to comply with the legislative enactment until the Act was changed or until instructed by a court to do otherwise.

The January 22, 1976 opinion of the Court of Appeals instructed the Fort Worth Independent School District that compliance with the Act was unlawful. Consequently, the School District ceased to comply with

the Act, pursued no appeal, and placed Plaintiff's name on the ballot as a candidate in the School Board election in April 1976, approximately six months prior to the attorney's fees amendment to 42 U.S.C. 1988, and ten months prior to the official entry of a new judgment by this Court.

The School District demonstrated no bad faith, or undue obstinacy, but simply diligently pursued their duty as dictated by statute. Had it not been for the delay of this Court in disposing of the final judgment, this matter would have been long since disposed of before the statutory amendment authorizing attorney's fees was passed. Under the facts of this case, to hold the Fort Worth Independent School District accountable for attorney's fees resulting from the honest pursuit and defense of their statutory duty would in this Court's discretion be not only inappropriate but unjust.

In summary, it is the discretionary opinion of this Court that an award of attorney's fees in this matter under 42 U.S.C. 1988 should not be based on or justified by any claim of social significance as presented by the limited and unique facts of this case. Nor is there any element of bad faith present upon which to base an award. The only basis under which an award of attorney's fees is even possible is the result of the unfortunate length of time taken by this Court in technically entering a final judgment. To penalize the Defendant School District for the extended time taken by this Court on acting on a procedural formality would not in the discretion of this Court be just, equitable, or in good conscience.

Accordingly, the Court ORDERS that Plaintiff's Motion for Attorney's Fees be denied.

Entered this 14 day of July, 1977.

UNITED STATES
DISTRICT JUDGE

Supreme Court, U. S.
FILED
FEB 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1264

THOMAS EARL HENDERSON JR. et al,
Petitioner,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al, Respondent

SUPPLEMENTAL APPENDIX C TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT [COURT OF APPEALS PANEL OPINION IN HENDERSON V. FORT WORTH INDEPENDENT SCHOOL DISTRICT, 574 F.2d 1210 WHICH WAS VACATED BY THE COURT EN BANC NOV. 17, 1978.]

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February 15, 1979

Thomas Earl HENDERSON, Jr., et al.,
Plaintiffs-Appellants,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al., Defendants-Appellees.

No. 77-2839
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 12, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before RONNEY, GEE and FAY, Circuit Judges.

RONEY, Circuit Judge:

This case comes before us for the second time. In our earlier decision we held it to be a denial of equal protection for a Texas statute to require that a candidate for the Fort Worth school board must have been a qualified voter in the district for a period of three years. We remanded the case to the district court for entry of an order consistent with that decision. Henderson v. Fort

Independent School Dist., 526 F.2d 286 (5th Cir. 1976). The district court entered an order in compliance with this Court's order, but denied plaintiffs' motion for attorney's fees after an evidentiary hearing. The sole question before us now is whether the district court abused its discretion in denying attorney's fees. We affirm.

After this Court's remand, but before the district court took up the issue of attorney's fees, the Civil Rights Attorney's Fees Awards Act of 1976 became law. 42 U.S.C.A.§1988. The district court held the Act applied, but denied plaintiffs counsel fees because, among other things, "to hold the Fort Worth Independent School District accountable for attorney's fees resulting from the honest pursuit and defense of their statutory duty would in this Court's discretion be not only inappropriate but unjust."

[1] In enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress sought "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 [95 S.Ct. 1612, 44 L.Ed.2d 141] (1975)." S.Rep.No.94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S.Code Cong. & Admin.News, pp. 5908, 5909. In Alyeska the Court of Appeals for the District of Columbia, without statutory authorization, awarded attorney's fees to plaintiffs on the theory that they were performing the services of a "private attorney general." The Supreme Court reversed, ruling that Congress alone has authority to specify when attorney's fees should be awarded in statutory actions. Consequently, after Alyeska a federal court could award attorney's fees to a prevailing litigant in actions brought under Title II

or VII of the Civil Rights Act of 1964, 42 U.S.C.A.§§2000a-3(b), 2000e-5(k), both of which specifically provide for attorney's fees, but could not allow fees in similar actions brought under 42 U.S.C.A.§§1981 or 1983. Congress responded to this anomaly by amending 42 U.S.C.A.§1988 to provide:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of [title 42]... the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs.

The legislative history of the Act makes clear that Congress intended that a prevailing plaintiff claiming under § 1988 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep.No.94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin.News, pp. 5908, 5912, quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). Newman

had first enunciated this standard for the allowance of attorney's fees in a case arising under Title II of the Civil Rights Act of 1964. The standard has since been found applicable to attorney's fee claims in Title VII cases. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

[2] Applying this standard to the circumstances of this case, the district court did not abuse its discretion in holding that an award of counsel fees against the school district would be unjust.

[3] First, it is apparent from the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 that Congress' overriding concern was to encourage individuals, particularly members of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria. See Brown v.

Culpepper, 559 F.2d 274, 278 (5th Cir. 1977); S.Rep.No.94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S.Code Cong. & Admin.News, p. 5908, 122 Cong. Rec. ¶ 1705 (daily ed. Sept. 29, 1976) (remarks of Sen. Kennedy). When enacted in 1925, the Texas statute was viewed by the Texas Legislature as an efficient device for ensuring that persons seeking a school board position be familiar with the workings of the board and the concerns of the district. Henderson v. Fort Worth Independent School Dist., 526 F.2d 286 (5th Cir. 1976). There is no indication in the record that the legislation was inspired by a desire to discriminate against any race, sex, or religion, or any other homogeneous segment of society, or that it in fact did so discriminate. Thus, palintiffs cannot avail themselves of the weighty argument that they are the type of plaintiff for which Congress

demonstrated a particular solicitude in en-acting § 1988.

Second, the school district's enforcement of the 3-year "qualified voter" requirement was not voluntary. It was mandated by the Texas Legislature under a 50-year-old statute which had never been constitutionally questioned before this case. Although the district court originally upheld the statute as a constitutional exercise of the state's power to prescribe minimal candidate qualifications, when this Court declared the statute unconstitutional, the school district ceased to comply with it, pursued no appeal, and placed plaintiff Henderson's name on the ballot in the following school board election.

Third, the financial burden of a fee award in this case would fall on people who participated in no discriminatory act, the taxpayers in the Fort Worth school

district. Defendants' unconstitutional conduct was statutorily required by the elected representatives of all Texas voters, of which the members of this district were a very small part.

At first glance, our consideration of the inculpable nature of defendants' conduct would appear to conflict with this Court's recent observation that "[i]n Title II and Title VII cases... the defendant's conduct, be it negligent or intentional, in good faith or bad, is irrelevant to an award of attorneys' fees." Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977). The Brown Court applied this reasoning to a case brought under the equal protection clause of the fourteenth amendment and 42 U.S.C.A. §§ 1981, 1983, holding that the district court erred when it denied plaintiffs' § 1988 claim for attorney's fees on the ground that defendants' racial and sexual discrimination had been unintent-

ional. Brown, however, is distinguishable from the instant case.

[4,5] Brown and the Titles II and VII cases upon which it relied involved distinctions based on virtually immutable personal characteristics, the most inherently offensive type of discrimination. A defendant may properly be held to account for his accuser's attorney's fees when his actions are found to discriminate invidiously, albeit unintentionally and in good faith, against a discreet and homogeneous group, capable of identification by reference to common ethnic, sexual, economic, or other personal characteristics identified by Congress through civil rights legislation as an illegal basis of discrimination. Generally, discrimination against such groups is discoverable and can be unilaterally remedied by the discriminator. The policies commending a liberal attorney's fee standard for successful plain-

tiffs in civil rights litigation are not diminished simply because the suit seeks to correct unintentional rather than intentional discrimination.

[6] In this case, however, the statute intentionally discriminated between those who had been qualified voters in the school district for three years and those who had not. The requirement operated blindly against all homogeneous classes of people; whites were affected the same as blacks, females the same as males. There was no unintentional discriminatory effect. In enforcing the requirement, defendants acted pursuant to a statute designed by the Texas Legislature to accomplish a legitimate purpose: to ensure that all candidates for positions on the school board have minimal qualifications. The state has power, derived from the tenth amendment, to prescribe reasonable qualifications for candidates for public

office, such as citizenship, age, and residency requirements. In other words, the state may legitimately discriminate between school board hopefuls on the basis of certain neutral criteria, excluding from the ballot those who cannot meet the prescribed qualifications.

[7] In our earlier decision we determined that the line drawn by the 3-year "qualified voter" requirement went beyond the necessary power of the state to prescribe minimal candidate qualifications permitted by the Constitution. Until this Court's pronouncement, however, the requirement was an apparently valid exercise of the state's admitted power to legislate in the area of candidate qualifications, and defendants were not at liberty to ignore the legislature's mandate. That defendants' actions were required of them by their constituting authority is relevant to a determination that it would be unjust

to hold them accountable for plaintiffs' attorney's fees. See Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976).

The asserted infirmity was virtually impossible for defendants to ascertain and correct, short of litigation or a change in legislation. Plaintiffs made no attempt to change the law in the legislative process.

We cannot say the district court abused its discretion in holding it would be unjust to award attorney's fees against defendants whose actions were taken under a Texas statute which did not discriminate on the basis of race, sex, or other similar classification and which defendants legitimately believed to be valid, were duty-bound to enforce, and were powerless to alter, and where plaintiffs made no attempt to correct the law in the legislative process. This was not a class action, so there are no class member considerations involved.

In denying plaintiffs' request for attorney's fees, the district court observed that defendants had been "guilty of no bad faith or undue obstinacy in the defense of this matter." Seizing upon this observation, plaintiffs urge that the court in effect applied the "bad faith defense" standard expressly rejected by the Supreme Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. at 401, 88 S.Ct. 964. A reading in context of the focus of the district court's bad faith comments clearly indicates, however, that it was not suggesting that plaintiffs could prevail only upon a showing of bad faith. After stating that it would not hesitate to award attorney's fees against defendants had they proceeded in bad faith the court went on to set the bad faith comments in proper perspective:

> This Court comments on the lack of bad faith simply for purposes of clarity and perspective, and in full

> awareness that there is no bad faith standard necessary under 42 U.S.C. 1988, and that under the statute an award of attorney's fees may be made even when there is a complete absence of bad faith.

[8] Plaintiffs last argue that their attorney's fees were recoverable under 42 U.S.C.A. § 1973l(e). Also passed in reaction to Alyeska, § 1973l(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Here plaintiffs sought to enforce their equal protection right to run for a position on the Fort Worth school board. Although the Texas statute's impact on the rights of voters did actuate strict scrutiny review by this Court in the first appeal of this case, Henderson v. Fort Worth Independent School Dist., 526 F.2d at 291-292, plaintiffs did not bring this action to "enforce the voting guarantees of the fourteenth or fifteenth amendment,"

but to enforce their equal protection right to run for public office. Thus, even if plaintiffs had properly raised § 1973l(e) in the district court, which they did not, it is inapplicable to the instant case.

In sum, the record factually supports the district court's finding of special circumstances to deny plaintiffs' request for counsel fees. This appellate court therefore cannot reverse under the abuse of discretion standard of review. The standard of review being what it is, this case does not hold that it would have been an abuse of discretion to award attorney's fees, only that it was not an abuse of discretion to deny them.

AFFIRMED.

Supreme Court, U. S.
FILED
MAR 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1264

THOMAS EARL HENDERSON, JR., *et al.*,
Petitioner

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, *et al.*, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Certiorari

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March 12, 1979

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Brief in Opposition to Certiorari

The respondent Fort Worth Independent School District respectfully prays that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit *en banc*, filed November 17, 1978, is reported at 584 F.2d 115 (5th Cir. 1978), and is reprinted in the Appendix to the Petition at Pages A-21 through A-22, and will be referred to herein as Henderson III.

The panel opinion of the United States Court of Appeals for the Fifth Circuit, filed June 12, 1978, is

reported at 574 F.2d 1210 (5th Cir. 1978), and is reprinted in the Supplemental Appendix C to the Petition at Pages C-1 through C-15, and will be referred to herein as Henderson II.

The opinion of the District Court, filed on July 15, 1977, on the issue of attorney's fees, is unreported, and is reprinted in the Appendix to the Petition at Pages B-23 through B-31.

The opinion of the Court of Appeals on the merits, filed on January 22, 1976, is reported at 526 F.2d 286 (5th Cir. 1976), and will be referred to herein as Henderson I.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Whether the district court abused the discretion conferred upon it by the Congress in the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. §1988), by finding that under the unique and special circumstances of this case an award of attorney's fees would be unjust, and, therefore, denying such award.

STATUTORY PROVISION INVOLVED

United States Code, Title 42:§1988

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this Title, and Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a

violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, The Court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

In 1925, the Fort Worth Independent School District was created by Act of the Texas Legislature. The Act required, among other things, that a candidate for the school board be a qualified voter in the school district for a period of three years.

In 1974, nearly 50 years later, petitioner Earl Henderson, then 18 years of age, filed application to become a candidate for the school board. Believing themselves bound by the state statute, the school authorities denied Henderson's application because he did not meet the 3-year qualified voter requirement.

On February 28, 1974, Henderson filed this suit, seeking an injunction to require that his name be placed on the ballot. After denials of preliminary relief by both the district court and the Court of Appeals, the district court, on May 12, 1975, entered an order upholding the validity of the 3-year qualified voter requirement and denying any relief to the plaintiff. The district judge, relying upon such authorities as *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), and others[1] was of the opinion that the "rational basis" test should be applied and that the questioned provision was constitutional. The case was submitted to the district court on stipula-

[1] e.g., *Manson v. Edwards*, 482 F.2d 1076 (6th Cir. 1973); *Blassman v. Markworth*, 359 F.Supp. 1 (N.D. Ill. 1973); *Chimento v. Stark*, 353 F.Supp. 1211 (D. N.H. 1973).

tions of fact and briefs, without the necessity of an evidentiary hearing.

On appeal to the Fifth Circuit, the Circuit's panel (Henderson I)[2] disagreed with the trial court, applied a "strict scrutiny" test, and held that the Texas Legislature exceeded its authority in requiring that a candidate for the school board be a qualified voter for three years. The decision of the Court of Appeals was rendered on January 22, 1976 — nine months prior to enactment on October 19, 1976, of the Civil Rights Attorney's Fee Award Act (42 U.S.C. §1988).

The school district did not move for rehearing or file a petition for a writ of certiorari. On the contrary, the school district immediately ceased to enforce the 3-year qualified voter requirement and honored petitioner's application to become a candidate in the 1976 school board election, held just 72 days after the decision of the Court of Appeals, and six months before passage of §1988.

It was over a year after the decision of the Fifth Circuit that the district court, on February 14, 1977, formally entered its order complying with the mandate. The entry of such order was, of course, a pure formality under the circumstances. Nine days later, petitioner filed his motion asking for an award of attorney's fees under §1988. While a prayer for attorney's fees had been included in the original complaint, such issue having been severed, nothing had been done by petitioner to obtain a ruling from the court, and this was the first time that entitlement to fees was asserted under §1988.

After an evidentiary hearing, the district court held

[2]526 F.2d 286 (5th Cir. 1976).

that "technically 42 U.S.C. 1988 is applicable." (Appendix B, p. 24) Noting that an award of attorney fees is, by the precise wording of the statute, discretionary with the court (Appendix B, p. 26), the trial judge said:

> "In the discretionary judgment of this Court it would be inappropriate to award attorney's fees under the facts presented in this case, ..." (Appendix B, p. 26-27)

The district court considered that there are unique and special circumstances in this case that render the award of a fee not to be "just, equitable, or in good conscience." (Appendix B, p. 30) In particular, the court discussed: (1) the fact that if it had not been for the court's delay in acting on a procedural formality, the case would have been disposed of long before §1988 was enacted; (2) the fact that the school district's enforcement of the questioned provision was mandated by legislative enactment, with which the school district had a duty to comply until the statute was changed or until instructed by a court to do otherwise; (3) the fact that this case was not a class action; (4) the relative unimportance of the case in terms of social significance; and (5) the complete and unchallenged good faith of the school district. In this last connection, the court made clear that no bad faith standard is required by §1988, and that the court's comment on that point was for "clarity and perspective." (Appendix B, p. 28)

On appeal to the Fifth Circuit, the Circuit's panel (Henderson II)[3] held that the record factually sup-

[3]574 F.2d 1210 (5th Cir. 1978).

ports the district court's finding of special circumstances that would render the award of attorney's fees unjust in this case. Under the abuse of discretion standard of revue, Henderson II found no abuse of discretion by the district court.

Henderson II also called attention to the fact that in enacting §1988, Congress' "overriding concern was to encourage individuals, particularly members of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria" (Appendix C, p. 5), and that such concern did not apply to the facts of this case. The Henderson II panel also noted that the asserted constitutional infirmity of the Texas statute "was virtually impossible for defendants to ascertain and correct, short of litigation or a change in legislation" (Appendix C, p. 12); that petitioner made no attempt to effect legislative change (Appendix C, p. 12); that this was not a class action (Appendix C, p. 12); and that the financial burden of a fee award would fall on people who participated in no discriminatory act, viz, the taxpayers of the school district (Appendix C, p. 7).

The Court of Appeals granted a petition for rehearing *en banc* and reached an even division (Henderson III)[4] resulting in an affirmance of the district court by operation of law. The Henderson III opinion does not set forth the views of the various judges.

The petitioner is in error at pages 3, 7, and 15 of the Petition in claiming that he was successful in "striking down" a further provision of the 1925 Texas statute which required that school board candidates

[4]584 F.2d 115 (5th Cir. 1978).

must also be freeholders in the district for one year. The school district has never sought to enforce the freeholder requirement since this Court's decision in *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed. 2d 567 (1970). The record will show that the parties stipulated that, "The defendants agree that the first requirement [the freeholder requirement] is constitutionally infirm and they do not undertake to enforce it." That issue was never in this case. The validity of the 3-year qualified voter requirement was the only issue on the merits.

REASONS FOR DENYING THE WRIT

I.

This Court should not review a matter which by Act of Congress was committed to the discretion of the district court.

Congress specifically made the award of attorney's fees a matter for the exercise of discretion by the district court under the circumstances of each case. The Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. §1988) says in pertinent part:

> ". . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."

The principle of trial court discretion has often been recognized by the courts in cases involving §1988 and identical provisions in other statutes. In *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978), the Fifth Circuit said:

> "The language of the Act itself unequivocally and expressly makes the award of fees a ques-

> tion of discretion for the court. Its judgment should be reversed only for an abuse of discretion." *Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 179 (4th Cir. 1978).

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648, 653 (1978), a Title VII case involving language identical to that of §1988, this court referred to the principle of:

> ". . . entrusting the effectuation of the statutory policy to the discretion of the district courts."

Mr. Justice Rehnquist, specifically referring to §1988 in his dissenting opinion in *Hutto v. Finney*, 57 L.Ed 2d 522, 551, footnote 4 (1978), said:

> "But that statute leaves the decision to award fees to the discretion of the district court, which may be expected to alleviate any possible unfairness."

To the same effect is *Adams v. Reed*, 567 F.2d 1283, 1287 (5th Cir. 1978), where the court said:

> "The discretion to determine the propriety of awards is committed to the trial judge." *Johnson v. Georgia Highway Express, Inc.*, 5 Cir., 1974, 488 F.2d 714, 717.

See also *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423, 427 (8th Cir. 1978); *Rainey v. Jackson State College*, 551 F.2d 672, 676 footnote 6 (5th Cir. 1977); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976); *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (N.D. N.Y. 1977). Cf., this Court's reliance upon ". . . the informed judgment of

the district courts . . . ." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554, 574 (1971).

Petitioner would have this Court place a construction on §1988 that would eliminate the word "discretion" from the statute. He argues for a mechanistic award of fees in any civil rights case without consideration of circumstances which would make a fee award unjust in a given case.

Review of a matter committed to the exercise of discretion by the district court does not authorize reversal merely because some might have reached a different conclusion. We respectfully submit that this Court should not substitute its judgment of the justice or injustice of a fee award in this case for that of the district court.

II.

The district court applied the correct standard for the exercise of the discretion vested in it by the Congress.

Both the district court and the Fifth Circuit panel in Henderson II found that the facts of this case present special circumstances which would render the award of attorney's fees unjust. Such findings are clearly a correct application of the standard for the exercise of judicial discretion which Congress intended under §1988, viz, that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep.No.94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912, quoting *Newman v. Piggie Park En-*

terprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

Thus, there is no issue here whether the lower courts followed an improper standard. The discretion conferred by §1988, having been exercised under the correct standard, should not be set aside.

III.

The district court was correct in concluding that the special and unique circumstances of this case would make an award of attorney's fees against the school district unjust.

Even if this Court were to hold that it, rather than the district court, should pass on whether the circumstances of this case would make a fee award against the school district unjust, we respectfully submit that the district court reached the correct result.

Delay of the District Court

Although the school district pursued no appeal and immediately ceased enforcement of the questioned provision upon the January 22, 1976, decision of the Court of Appeals, there was a delay of over a year before the district court carried out the procedural formality of entering a final judgment pursuant to the mandate. If such formality had been carried out with ordinary promptness, this case would not have been pending, even technically, when §1988 was enacted in October, 1976.

It would be unjust to award fees under a statute that was not enacted until nine months after the case was decided and enforcement of the unconstitutional provision had ceased. An award under such circumstances would be to exalt form and completely ignore substance. It would penalize the school district for an act not of its doing or under its control. It would give petitioner an undeserved windfall. It would not serve the Congressional policy of encouraging private litigation to enforce important constitutional rights.

The State Statute

The school district's enforcement of the 3-year qualified voter requirement was not voluntary, but mandated by a 50-year old statute that had never before been questioned. The school district had no power to alter the statute. Petitioner made no effort to change the law through legislative processes. The school district was duty-bound to follow the state law until it was changed or a court instructed otherwise.

Furthermore, the asserted constitutional infirmity of the 3-year qualified voter provision was virtually impossible for the school district, unilaterally, to ascertain and correct. In marked contrast, the unconstitutionality of the freeholder provision of the same statute was clear, under *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). The school district did not enforce or defend the freeholder provision. The 3-year qualified voter provision was an apparently valid exercise of the state legislature's power to prescribe minimal candidate qualifications. The district court so held. In all reason the issue seemed to favor upholding the validity of the provision until the Court of Appeals applied the "strict scrutiny" test and held it invalid. It would be dangerous and unrealistic to require school boards to attain constitutional clairvoyance on such doubtful issues,

and in doing so to ignore their sworn and constitutional duty to follow the laws of the state.

Furthermore, when the Court of Appeals declared the questioned provision unconstitutional, the school district ceased to comply with it immediately, pursued no appeal, and placed petitioner's name on the ballot for the school board election just 72 days later. Just as the Fourth Circuit said in affirming the denial of a fee award in *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976):

> "We cannot say that it [the defendant] failed to act with reasonable dispatch as soon as a murky area of the law was clarified."

The fact that the defendant in *Chastang* did not have an unrestricted right to alter the situation was held to be a special circumstance that would render the award of an attorney fee unjust.

Social Significance

As the district court put it, "the judgment rendered for plaintiff is not of sufficient social significance to justify an award of attorney's fees under 42 U.S.C. 1988." (Appendix B, p. 27) The private attorney general rationale announced in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968), came from this Court's awareness that:

> "When the Civil Rights Act of 1964 was passed it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." (19 L.Ed.2d at 1265)

The national importance of the rights vindicated in *Newman*, and the inherently difficult enforcement problems that spawned the rule to encourage private litigants, are wholly lacking in the case at bar.

Likewise, the overriding concern of Congress in enacting §1988 was to encourage individuals, particularly members of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria, See the examples of cases given by Senator Kennedy, 122 Cong. Rec. S1705, (daily ed. Sept. 29, 1976) (remarks of Sen. Kennedy), and by Representative Fish, 122 Cong. Rec. H12163, (daily ed. Oct. 1, 1976) (remarks of Rep. Fish), during debate on §1988. In each of the examples, the discrimination was discoverable (to say the least) and could have been unilaterally remedied by the discriminator. Not so in the case at bar.

A state statute which "discriminated" between those who had been qualified voters for three years and those who had not, for the purpose of providing minimal candidate qualifications, does not fit in the list of examples considered by the Congress in the debate on §1988. There is no invidious discrimination based on inherently offensive criteria. Inherent problems of enforcement are not present. No fundamental or national importance is involved. The case at bar was not even a class action. Its result was of extremely limited effect and narrow scope. It does not further or fit the Congressional purpose. It would be unjust to expand §1988 to such cases.

Good Faith

The actions of the school district in this case were in complete and unchallenged good faith. We recognize, as did the district court, that no bad faith standard is required by §1988. We comment on it, as did the trial judge, for "clarity and perspective." (Appendix B, p. 28) Furthermore, the absence of bad faith negatives any ground for the recovery of attorney's fees other than §1988. We also suggest that in considering whether there are special circumstances that would render an award of attorney's fees unjust in a given case the courts should not be guilty of tunnel vision. No case is made up of just one fact or circumstance. Surely, good faith should count for something in the cummulative consideration of all the circumstances bearing on the justice or injustice of a fee award.

> "To hold otherwise would compel a mechanistic application of fee awards which would preclude entirely the exercise of discretion by the district court." *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1152 (4th Cir. 1975), (dissenting opinion of senior Circuit Judge Boreman)

Considering *all* the circumstances of this case, we submit that the district court was correct in finding that an award of attorney's fees would be unjust.

IV.

This Court should not exercise its supervisory power over the lower courts on an issue committed to district court discretion.

Petitioner urges this Court to exercise its supervisory power over the lower courts merely because the Court *en banc* reached an even division. We submit that to do so on an issue committed to district court discretion would be to cast this Court in the role of a super legislature. It would be to render an advisory opinion. This Court should not attempt to determine what circumstances would or would not render the award of a fee in a given case unjust. but should leave such determination to the district courts, on a case by case basis, subject to the familiar standard of review for abuse of discretion. Such circumstances as the trial court's delay in carrying out the procedural formality of entering final judgment, resulting in the technical pendency of this case when §1988 was enacted nine months after the issues were decided, are exteremely unlikely to occur again. Future cases will have their own uniqueness. Formulation of mechanistic special circumstance rules by this Court could not be broad enough to alleviate the task of the lower courts, the task assigned by Congress, to determine those cases where an award of attorney's fees would be unjust.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully prays that the Writ be denied.

Respectfully submitted

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